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No. 85-545

In the Supreme Court of the United States

OCTOBER TERM, 1985

DONALD WYRICK, Warden of the Missouri State Penitentiary, BILL ARMONTROUT, Assistant Warden of the Missouri State Penitentiary, LT. "GARY" WYRICK,
Petitioners,

vs.

RONALD L. PARTON,
Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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STATUTES INVOLVED

1. Rule 104 of the Federal Rules of Evidence provides as follows:

> (a) Questions of admissibility generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.
>
> (b) Relevancy conditioned on fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or

subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

(c) Hearing of jury. Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require or, when an accused is a witness, if he so requests.

(d) Testimony by accused. The accused does not, by testifying upon a preliminary matter, subject himself to cross-examination as to other issues in the case.

(e) Weight and credibility. This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

2. Rule 403 of the Federal Rules of Evidence provides as follows:

Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

STATEMENT OF THE CASE

Respondent makes the following additions and corrections to Petitioners' Statement of the Case: The testimony of Petitioners' witness in the offer of proof made no reference as to how the statement in question was connected to this lawsuit. A review of the record reveals the following:

THE COURT: Miss Mescher, I would like you to take this witness' testimony outside the presence of the jury as an offer of proof so I can make an accurate determination, particularly in regard to the foundation.

Q (By Miss Mescher.) Mrs. Mueller, were you in the visitor's lounge at one point—

THE COURT: Mrs. Mueller, at what point was this?

THE WITNESS: It was shortly after Ron had come back from Moberly.

THE COURT: Can you give me an approximate date on that?

THE WITNESS: Just like I said, it was shortly after he had come back from Moberly to MSP.

THE COURT: By shortly, what do you mean? A week? Two weeks?

THE WITNESS: A week or two weeks.

THE COURT: Would you put it in time in late August?

THE WITNESS: If that is a week or two afterwards, yes, sir.

THE COURT: Proceed.

Q (By Miss Mescher.) And how close were you to Mr. Parton and his wife?

A. I was sitting right next to them.

Q What were you doing while you were there?

A I was waiting for an inmate to come in.

Q Did you happen to overhear a conversation?

A Yes, I did.

THE COURT: Before we get to that, I want to know a little bit more about it. Were they seated at the table?

THE WITNESS: No.

THE COURT: Were they seated at the couch or chairs?

THE WITNESS: Couch or chairs.

THE COURT: Were they separated by a screen?

THE WITNESS: No.

THE COURT: They were in the open visitor's room?

THE WITNESS: Yes.

THE COURT: And were they facing each other?

THE WITNESS: Well, the chairs are along the wall and he was in one chair and she was right next to him, or on the couch. They were right next to each other.

THE COURT: Where were you?

THE WITNESS: Right next to that.

THE COURT: A chair down? Two chairs down?

THE WITNESS: No. There is like a row of chairs or couches and they all sit right next to one another. So I was right to the next set of chairs.

THE COURT: Could you give me some approximation that is distance? Were you within ten feet of them?

THE WITNESS: I was probably closer than that jury box would be to me.

THE COURT: So you would say you were at least within ten feet of them?

THE WITNESS: Yes.

Q (By Miss Mescher.) Could you hear what they were saying?

A When I first went into the visiting room, I said hello to Ron and his wife. Then I could hear conversation.

Q How loud were they speaking?

A Not extremely loud. Not out of ordinary conversation. Not above that level.

Q Were they speaking to you?

A No. They were speaking to each other.

Q Do you have an inclination of what the context of the conversation was about?

A Well, I knew that Ron had been brought in from Moberly and I knew, had heard that he had filed a suit, because he had been hurt.

Q And what did you hear him say?

A I heard him talking to his wife, asking her if she had heard from the attorney. Then—really what caught my attention was his wife's voice. It sounded like she was crying, without turning and looking at them, just the sound of her voice. It sounded like she was crying or about to cry.

Q What did she say?

A She said she was afraid that they would find out that Ron was lying.

Q Did he have a response to that?

A He said. "Don't worry. They are not going to find out."

Q Did you overhear anything else they said to each other?

A About that time one of the little children in the room came up and knocked into the table that was in front and spilled some stuff and there was a big commotion clearing up what was spilled.

Q Did you hear anything more that they might have said to one another?

A No. Then the other inmate came in and I talked and then I left shortly after that.

Q Did that inmate know the Partons?

A Yes.

Q Was there any conversation between the Partons and that inmate?

A "Hello. How are you?"

Q Anything to do with the lawsuit?

A No.

MISS MESCHER: That would be my offer of proof.

THE COURT: Did you know this one conversation was to be about this lawsuit or a charge against the Department of Corrections or the people that work for the Department of Corrections?

THE WITNESS: I could just tell what I heard, which was, "Have you heard from the lawyers?" I heard her say she was worried that they would find out he was lying.

THE COURT: Did they say lying about what?

THE WITNESS: No.

THE COURT: Did you know it to be discussed in this particular lawsuit or these claims?

THE WITNESS: Did she say this particular?

THE COURT: Yes.

THE WITNESS: No.

THE COURT: You don't know what the general subject matter of the conversation was about?

THE WITNESS: Just what I heard.

THE COURT: What did you hear? Is that all that you heard, what you just related?

THE WITNESS: That's all I heard.

THE COURT: Did they mention any claim against Donald Wyrick? Did you hear them talking about any claim against Donald Wyrick?

THE WITNESS: To be honest with you, it was so long ago that the only thing that still sticks in my mind is her saying she was afraid they would find out that he was lying and him saying that, not to worry about it, that they wouldn't find out.

THE COURT: Did you ever hear Mr. Wyrick's name mentioned in the conversation?

THE WITNESS: Not that I remember.

THE COURT: Did you ever hear Mr. Strobietto's name mentioned in the conversation?

THE WITNESS: I didn't even know who this is.

THE COURT: How about Mr. Armontrout?

THE WITNESS: No.

THE COURT: How about Mr. St. John?

THE WITNESS: No.

THE COURT: How about Mr. Gary Wyrick?

THE WITNESS: No.

THE COURT: So in other words what you are telling me, you really didn't know what the general conversation was about? You only heard her saying something to the effect, "What if they catch you lying?" And his response was, "They won't."

THE WITNESS: That's right.

THE COURT: Miss Mescher, I don't see, with that kind of foundation, how I can allow it in evidence.

MISS MESCHER: That's a ruling you have to make, your Honor. I am making this as an offer of proof.

The trial court never refused to hear any offer of proof or attempted offer of proof tendered by Petitioners. The following dialogue occurred between the District Court and Petitioners' Counsel:

THE COURT: Upon what inference would I base that connection? My ruling might be otherwise if you could show by way of foundation that these claims are potential claims against the Missouri Department of Corrections was involved. (T. 488 lines 22-25)

MISS MESCHER: That's all I know, your Honor. I have information from another witness that I didn't intend to call. That's the only foundation I can offer from this testimony. Other information leads me to believe there was conversation about the lawsuit and another party to the conversation also heard it. (T. 449 lines 1-6)

THE COURT: Now, you made an offer of proof last night. You offered to show that your offer of

proof was that Mr. Parton had no other lawsuit pending at the time. How would you intend to prove that?

MISS MESCHER: I would call Mr. Parton and ask him if he filed any other suits at the time. From our records, he has not, but I would call him and ask him. (T. 548 lines 12-18)

THE COURT: The problem is your witness can't link it to the lawsuit.

MISS MESCHER: The fact there is no appointed lawyer doesn't mean one was contacted. I didn't ask if Parton talked to a lawyer and neither did Mr. Riner.

I would offer and I would ask him if he would put him to—to ask him if he had any other lawsuits pending, if he tried to contact a lawyer about this. I think from Parton's testimony they were trying to get this kind of situation rectified. At least Mr. Parton testified he talked to everyone who would listen to him.

THE COURT: I have addressed it once and I have addressed it twice. I understand that if the jury believes the statement, that the statement relates to the lawsuit, it would have just a devastating effect on the lawsuit, in my judgment.

I have given it some very weighty discussion. I have discussed it with my law clerk. I have thought about it back and forth I thought about it last night, and a half an hour at the recess when it was first posed to me.

It is unlike most situations that have minimal impact on a lawsuit. I think this kind of testimony would have devastating effect on the lawsuit if the

jury believed that the statement linked to this lawsuit itself. But I just don't think the link is there.

MISS MESCHER: It would be my position that that is a decision they could make after hearing the foundation evidence, all that I could put on, and then make the decision themselves what to believe and to what it went to. (T. 550 lines 23-25) (T. 551 lines 1-25) (T. 552 line 1)

ARGUMENT

The ruling of the United States Court of Appeals for the Eighth Circuit is not in conflict with other circuits and conforms with Rules 104(b) and 403 of the Federal Rules of Evidence.

The Circuit Courts of Appeal are not in conflict with the proposition that a trial court has broad discretion in determining relevancy of evidence and that a trial court's ruling on admissibility of evidence should not be disturbed absent a clear and prejudicial abuse of discretion, *Pesaplastic, C.A. v. Cincinnati Milacron Co.*, 750 F.2d 1516, 1524 (11th Cir. 1985), *Consolidated Grain and Barge Company v. Marcona Conveyor*, 716 F.2d 1077, 1083 (5th Cir. 1983), *Charles v. Daly*, 749 F.2d 452, 463 (7th Cir. 1984), *United States v. Catalano*, 491 F.2d 268, 273 (2nd Cir. 1974), *cert. den.*, 419 U.S. 25 (1974), *O'Rourke v. Eastern Air Lines, Inc.*, 730 F.2d 842, 854 (2nd Cir. 1984), *Beacham v. Lee-Norse*, 714 F.2d 1010, 1014 (10th Cir. 1983), *Hill v. Rolleri*, 615 F.2d 886, 890 (9th Cir. 1980), *Beatty Shopping Center, Inc. v. Monarch Ins. Co. of Ohio*, 315 F.2d 467, 471 (4th Cir. 1963), *McKinney v. Galvin*, 701 F.2d 584, 586 (6th Cir. 1983), *Construction, Ltd. v. Brooks-Skinner Building Company*, 488 F.2d 427, 431 (3rd Cir. 1973), *Wade v. Haynes*, 663 F.2d 778, 783 (8th Cir. 1981).

The Eighth Circuit's ruling does not affect the uniform application and interpretation of the Federal Rules of Evidence in the area of conditional relevancy as petitioners suggest, because at trial there was no evidence offered tying the contested statement to the case at hand. (See respondent's Statement of the Case.) Because of that, the rulings of the Eighth Circuit and the District Court are not in conflict with the cases cited by petitioners. A brief review of those cases demonstrates the distinctions. In *O'Neal v. Morgan,* 637 F.2d 846 (2nd Cir. 1980), the plaintiff attempted to elicit testimony concerning an admission allegedly made by a defendant that the defendant had beaten the plaintiff's husband. The beating itself was the subject of the lawsuit. There was then a direct connection between the statement and the case, and the statement was relevant.

In *United States v. Barletta,* 652 F.2d 218 (1st Cir. 1981), a police informer called the defendant seeking an admission to a crime. Because of the nature of the call, the court could infer the conversation was about the criminal activity being investigated making the statement relevant to the case. *Bowden v. McKenna,* 600 F.2d 282 (1st Cir. 1979), involved an action against police officers by the widow of a man killed by the officers moments after the commission of a crime. The contested statements and actions explaining the conduct of the plaintiff's deceased husband and the defendants took place at the time of the incident itself. They were, in effect, part of the *res gestae.* Thus, as in *O'Neal* and *Barletta,* there was a direct connection between the offered evidence and the subject of the lawsuit. Such a connection is lacking in the instant case. Petitioners were given every opportunity to tie the statement of witness Donna Mueller to the case, but were unable to do so.

Finally, *Ballou v. Henri Studios, Inc.*, 656 F.2d 1147 (5th Cir. 1981) involved a simple credibility choice made by a trial judge. The trial court there chose to believe the testimony of a witness rather than test results of a blood test and incorrectly excluded evidence of the test results on the basis that it lacked credibility. In the instant case credibility was not the basis of the ruling.

Thus, the opinion of the Eighth Circuit and the ruling of the District Court are not in conflict with other circuits or the cases cited by petitioners, and the discretion of the District Court should not be questioned.

CONCLUSION

WHEREFORE, respondent requests this Court deny petitioners' request for a Writ of Certiorari.

Respectfully submitted,

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